No. 80-1747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BETHLEHEM STEEL CORPORATION, E. RICHARD DRIGGERS, JAMES DEAVER and THOMAS R. CONNELLY,

Petitioners,

—against—

ROYSWORTH D. GRANT, WILLIE C. ELLIS and LOUIS MARTINEZ, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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June 3, 1981

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Pursuant to Rule 28.1 of this Court, the footnote appearing at page i of the Petition is incorporated herein by reference.

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Petitioners Bethlehem Steel Corporation, E. Richard Driggers, James Deaver and Thomas R. Connelly (collectively "Bethlehem"), submit this brief in reply to respondents' Brief In Opposition to Bethlehem's petition for a writ of certiorari ("Petition").

Reasons for Granting The Writ

Respondents' Brief In Opposition represents an attempt to obscure the Petition's focus on issues critical to the consistent, orderly allocation of burdens of proof in Title VII cases. Rather than address these fundamental questions, respondents resort to a smokescreen of unsupported propositions of fact coupled with a contrived interpretation of the holding of the Court of Appeals.

Central to respondents' argument in opposition is their contention that "there was no uniform practice of appointing or attempting to appoint foremen who had prior Bethlehem foreman experience nor even a practice of appointing foremen who had considerable ironworker experience with the company." (Brief in Opposition at 3). They posit that Bethlehem's "true" policy with respect to supervisory hiring is illuminated by their own artfully crafted collage of isolated instances of purported nepotism.

Respondents have resorted to such distortion in a blatant attempt to recharacterize the Court of Appeals' opinion as being nothing more than appellate fact finding in which "Bethlehem's 'business necessity' defense was simply not credited" by the Court of Appeals (Brief in Opposition at 8), in order to obscure the Second Circuit's explicit decision to limit *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978) and *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) to disparate treatment cases.

Respondents' legerdemain cannot, however, withstand scrutiny.

First, if, as suggested by respondents, the Second Circuit had merely refused to "credit" Bethlehem's evidence that it followed a practice of preferring foremen whose qualifications were, by virtue of prior exposure, susceptible of subjective evaluation, then it clearly usurped the function of the trier of fact. That the Court of Appeals did not do so is clear.

The District Court found that Bethlehem's superintendents "substantially followed the order of hiring preference set forth in the previous finding" (Petition, Appendix B-6). The preference referred to ranked prior Bethlehem foreman experience and Bethlehem ironworker experience ahead of other sources of information about potential foremen. (*Id.* at B-5).

Having concluded that Bethlehem superintendents in fact preferred prior Bethlehem foremen, the District Court further found:

> "We believe that Bethlehem was justified by business necessity (see Furnco, supra) in preferring men with prior Bethlehem foreman experience. This practice allowed Bethlehem to rely on men with proven ability. Of the 126 foremen jobs, Bethlehem in fact filled 97 with men who had such experience. Of these, some 90 had gained their initial Bethlehem foreman experience prior to 1970, at a time when there were few blacks working in the industry." (*Id.* at B-7, n.13).

In evaluating the evidence as to Bethlehem's hiring practices, the District Court noted that it found "wholly credible" the testimony of Bethlehem's executives who provided the evidence of Bethlehem's reasons for and intent behind those practices, as well as the business necessity for them. (Trial Transcript at 1473).

The Court of Appeals did not hold that those findings were clearly erroneous. Nor could it have made such a determination. The record is uncontroverted that 97 of the 126 Bethlehem foremen appointed had previously been Bethlehem foremen (Petition, Appendix A-10) and another 12 had worked personally for the hiring superintendent as ironworkers.*

Respondents do not refute these facts. The Court of Appeals did not find otherwise.

Notwithstanding this uncontradicted evidence of Bethlehem's consistent pattern of seeking out ironworkers of known qualification, respondents state that the key to the Court of Appeals' reversal was its finding that Bethlehem's business necessity defense was "spurious". (Brief In Opposition at 8). Respondents also urge that the Court of Appeals "specifically applied the *Griggs-Dothard-Albermarle* [sic] analysis in this case." (*Id.* at 7).

The very justaposition of these two arguments belies the contention that the key to the reversal herein was a finding of "spuriousness". *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), both provide for findings at the third stage of a Title VII case that the business practice advanced in justification was merely a "pretext" to mask discrimination. Notwithstanding respondents' speculation that the Court of Appeals found Bethlehem's defense to be "spurious," neither the District Court nor the Court of Appeals made a finding that Bethlehem's explanation was merely a "pretext" -- as required by both *Dothard* and *Albemarle*.

Respondents' "spurious" characterization is further refuted by the fact that the Court of Appeals remanded for further proof on Bethlehem's business necessity defenses. (Petition, Appendix A-26). Under *Dothard* and *Albemarle* those defenses are presented at the second stage of proof. A finding that Bethlehem's defenses were "spurious" or pretextual would necessarily have occurred at the third stage and would have resulted in judgment, not remand.

* The record is similarly uncontradicted that one other foreman had been a foreman for another erector for 20-30 years; three more had been apprentice instructors with superintendent Deaver; and two more had worked personally with the hiring superintendent for other companies.

The Court of Appeals did apparently make one finding which was central to its decision with respect to respondents' disparate impact case. It speculated (as did the Court of Appeals in *Furnco*) that some form of recordkeeping by Bethlehem would have resulted in more black or Puerto Rican ironworkers being considered for supervisory appointment. (*Id.*) Given the hypothetical existence of a method which might have increased minority representation in supervisory ranks, it held that Bethlehem's failure to rebut that "better way" constituted a failure to satisfy its burden of proof of business necessity at the second stage of proof. (*Id.*)

The Court of Appeals' conclusion that Bethlehem could not satisfy its burden of proof of business necessity by simply "articulating" a legitimate, nondiscriminatory reason for employment decisions (Petition, Appendix A-17), but rather that Bethlehem was also required to prove as part of its burden at the second stage of proof that it had chosen the method which maximized minority recruitment (Petition, Appendix A-18), is squarely at odds with this Court's holdings in *Furnco*, *Keene State* and *Texas Department of Community Affairs v. Burdine*, ___U.S. ___, 101 S.Ct. 1089 (1981), and with the holding of the Sixth Circuit in *Chrisner v. Complete Auto Transit, Inc.*, ___ F.2d ___, No. 78-1337 (6th Cir. March 19, 1981, Petition Appendix D).

The Second Circuit explicitly recognized the inconsistency between its decision and *Furnco* and *Keene State*. It attempted to reconcile that inconsistency by holding that *Furnco*'s standards did not apply in disparate impact cases:

> "The employer's burden of proving job-relatedness to rebut a claim of disparate impact is greater than its burden of merely showing a legitimate, nondiscriminatory reason in response to a claim of discriminatory treatment." (Petition, Appendix A-17).

It reasoned that

> "If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued. [citations omitted]." (Petition, Appendix A-18).

While the Court of Appeals' express limitation of *Furnco*, *Keene State* (and implicitly *Burdine*), logically reconciled the Court of Appeals' own decision, it necessarily imposes a greater burden of proof on employers in disparate impact cases. In so doing, it effectively collapses the three stage proof pattern, which this Court has consistently applied, into a two stage process. In effect, it requires the employer to rebut the existence of "any better way" as part of its burden at the second stage, rather than imposing the burden of proving "pretext" on the plaintiff at the third stage.

This deliberate reallocation of the burdens of proof in disparate impact cases is of fundamental importance to the orderly resolution of hundreds of pending and future disparate impact cases with far-reaching economic and industrial consequences.

It represents an express attempt to distinguish away *Furnco*, *Keene State* and *Burdine*.

It is directly inconsistent with this Court's prior holdings in *Dothard* and *Albemarle*, both of which established a three-step proof pattern with the burden of proving pretext in disparate impact cases squarely on the plaintiff.

It also creates a direct conflict of decision with the Sixth Circuit's decision in *Chrisner*.

The Petition is sought primarily because the Second Circuit has imposed a novel and improper allocation of burdens of proof in Title VII cases, one which is inconsistent with the decisions of this Court and other circuits, and because an orderly, consistent pattern of proof in Title VII cases should be uniformly established and applied. Those important concerns should not be obscured by fanciful issues of fact conjured up by respondents' creative juxtaposition of isolated incidents over nearly a decade of ironworker experience.

Conclusion

For the reasons set forth above and in the Petition Bethlehem submits that the Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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